STATE OF MICHIGAN

SUPREME COURT

LINDA M. GILBERT,

Plaintiff-Appellee,

vs.

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court
Case No. 122457

Court of Appeals
Docket No. 227392

Lower Court
Case No. 94-409216-NH

_____/

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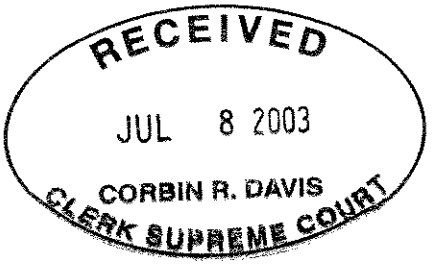
BRIEF OF AMICUS CURIAE

MICHIGAN CHAMBER OF COMMERCE



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STATUTES

MISCELLANEOUS

I. SUMMARY OF ARGUMENT

This case provides an opportunity for this Court to clarify the role of a trial court in evaluating proposed expert witness testimony. The Court should hold that this Court's adoption of the Michigan Rules of Evidence – specifically, MRE 702 – superseded the test for admissibility of expert evidence established by this Court in *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955). Such a ruling would follow the lead of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), in which the Court held that Federal Rule of Evidence 702 superseded the test for admissibility of expert testimony established in *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923).

The Court should also explain that, under either analysis, trial courts must exclude expert testimony that is outside the expert's credentials and/or that constitutes "junk science." Whether *Frye-Davis* or *Daubert* governs, the importance of barring expert testimony outside of the expert's credentials could not be made more evident than here, where $21 million in "compensatory" damages was awarded for offensive, but not particularly egregious, co-worker mistreatment of an employee who is still at work today. As the Court of Appeals conceded, the exorbitant award resulted from the following "expert" medical testimony of a social worker who committed résumé fraud and concealed a long-standing employment relationship with plaintiff's counsel: The plaintiff, addicted to alcohol and a long-time drug user at the commencement of her Chrysler employment, was – according to the expert – unbeknownst to her, going to die of hepatitis, dehydration, acidosis, cirrhosis or pancreatitis (according to the social worker, "the most painful way to die")[1] because the sexual harassment prevented her from overcoming her addiction[s]. The Michigan Chamber of Commerce is dismayed at the frequency with which unqualified "hired guns" are being allowed to

[1] Appellant's Appendix, p. 683a. Hereafter, all citations in the form "___a" refer to the Appellant's Appendix.

present speculative argument in the guise of expert testimony, and the inconsistent manner in which Michigan trial courts are allowing or not allowing such testimony. This Court should now clarify that MRE 702 imposes on trial courts an expert witness/gatekeeper function, in order to protect litigants from witnesses who would testify outside their expertise, commit résumé fraud, and conceal bias by misrepresenting a prior relationship.

This case also provides an opportunity for this court to provide guidance on the review of damage awards. The Court should hold that trial and appellate courts must look to other judicially approved awards in analogous cases to ascertain whether the award in question exceeds an established range of reasonableness. This Court should expressly state that its opinion in *Palenkas v. Beaumont Hospital*, 432 Mich. 527, 443 N.W.2d 354 (1989), requires trial and appellate courts considering the excessiveness of an award to compare that award with other judicially affirmed awards to determine whether it has exceeded a range of reasonableness, and is therefore excessive. In *Palenkas*, this Court, in deciding whether a remittitur was warranted, explained that the Court of Appeals there should have looked to comparable awards in similar cases in Michigan and other jurisdictions to determine a range of reasonable awards and, by comparison, whether the particular award in question was excessive. *Id.* at 538. The Court of Appeals in this case clearly did not believe that this Court was directing such a comparison in every case:

> While some opinions make fleeting reference to comparable jury awards, the core analysis remains focused on the evidence in the case at bar. Jury awards in different cases involving wholly unrelated facts are not particularly germane to whether the trial court erred in denying remittitur, especially when the awards cited were given many years ago.

(94a) (emphasis added). This Court should reinforce the instruction provided by *Palenkas*.

In sum, this case provides the Court with the opportunity to make two critical holdings. First, where an excessive award is obtained in material part by a purported expert who testified outside his qualifications, who committed résumé fraud and perjury, or who concealed a longstanding personal and financial relationship with plaintiff's counsel, a total new trial should normally be ordered; if for any reason a new trial is not warranted, such factors at a minimum should be considered in analyzing the excessiveness of the damages. Second, in analyzing the "soft" (here pain and suffering) damages for excessiveness, this Court should advise lower courts to look to other judicially affirmed awards in similar cases to establish a range of reasonableness. Unless the case in question presents the most egregious facts or injury ever, the award normally should be within this range of reasonableness.

II. INTEREST OF AMICUS

The Michigan Chamber of Commerce is a nonprofit Michigan corporation that represents the interests and views of over 7,000 private Michigan corporations and businesses engaged in civic, professional, commercial, industrial, agricultural, and recreational activities throughout the State. When this Court speaks on important matters in the area of employment law, its decisions have a direct and significant impact on our members. The Chamber exists in significant part to represent the interests of its members in important matters before the courts of the State of Michigan. The Chamber has sought to advance those interests, in part, by filing briefs *amicus curiae* in dozens of cases of significance.

The decision below provides numerous reasons for this Court to overturn the jury verdict and order JNOV or, in the alternative, a new trial. Defendant/Appellant DaimlerChrysler Corporation ("DaimlerChrysler") has described many of these reasons in its Brief. Two of these are of particular interest to the Chamber and deserve additional attention: (1) the trial court abdicated its

gatekeeping function with regard to expert witnesses, and (2) the trial and appellate courts, when reviewing the excessive damages award, failed to compare that award to judicially approved awards in other analogous cases. Because the Michigan Chamber represents the views of businesses throughout the State, it is in a unique position to explain to this Court the practical implications of the Court of Appeals' resolutions of these issues on the business community and on public policy.

III. THE TRIAL COURT SHOULD HAVE EXCLUDED PLAINTIFF'S "EXPERT" TESTIMONY PURSUANT TO ITS GATEKEEPER FUNCTION; ABSENT JNOV, A NEW TRIAL SHOULD BE ORDERED

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), the United States Supreme Court held that the Federal Rules of Evidence, adopted in 1973, superseded the test for admissibility of expert testimony established in 1923 in *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923). As the Court of Appeals here noted,[2] this Court has not yet adopted the principles of *Daubert*, and instead applies the test announced in *Frye*, adopted by this Court in *Davis* in 1955.[3] But this Court adopted the Michigan Rules of Evidence in 1978, well after the *Davis* opinion. Like the United States Supreme Court did in *Daubert*, this Court should now decide that the Michigan Rules of Evidence – specifically MRE 702, modeled after FRE 702 – superseded the test for admissibility of expert evidence established by this Court in *Davis*.

The Michigan Chamber of Commerce respectfully suggests that such a determination is overdue. It is particularly apt here because the Court of Appeals affirmed the admissibility of some of a social worker's medical testimony as "common knowledge" and thus meeting the test of

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[2] 90a.

[3] *See also People v. McMillan*, 213 Mich. App. 134, 137 n.2, 539 N.W.2d 553 (1995) ("The prosecution urges this Court to follow [*Daubert*] and replace the *Davis-Frye* standard. However, we are bound to continue to follow this standard until the Michigan Supreme Court overrules or modifies its decisions in this area.").

MRE 702. (90a-91a.)[4] But MRE 702, like FRE 702, imposes many more critical obligations on trial courts than simply determining what is common knowledge.[5]

Thus, while some courts have suggested that the *Daubert* test is more flexible or less rigid than *Frye* (or *Davis*), *Daubert* does impose specific obligations on trial courts to insure the reliability of expert testimony that do not necessarily exist under *Frye/Davis*. As the *Daubert* Court explained:

> That the *Frye* test was displaced by the Rules of Evidence [here, the displacement of *Davis* by the MRE] does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

Daubert, 509 U.S. at 589 (emphasis added). This Court should now clarify that MRE 702 displaced *Davis* and that the obligations outlined by *Daubert*, stemming from the nearly identical FRE 702, also are imposed upon Michigan trial courts.

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[4] The Court should reject the mistaken view that where purported expert testimony is not "novel," the trial court need not engage in any reliability assessment at all. *See Craig v. Oakwood Hosp.*, 249 Mich. App. 534, 546, 643 N.W.2d 580 (2002) (Cooper, P.J., concurring in part and dissenting in part) ("Pursuant to MRE 702, the *Davis-Frye* test limits the admissibility of *novel* scientific evidence . . . . Absent novel scientific evidence there is no need for the trial court to conduct a *Davis-Frye* hearing.") (emphasis in original). *See Daubert*, 509 U.S. at 592 n. 11 ("Although the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence.").

[5] Indeed, if something is "common knowledge," then a purported expert's testimony will not "assist the trier of fact," *see* MRE 702, and should be excluded as irrelevant. *See United States v. Vallejo,* 237 F.3d 1008, 1019 (9th Cir.), *amended by*, 246 F.3d 1150 (9th Cir. 2001) (to be admissible, "expert testimony must . . . address an issue beyond the common knowledge of the average layman").

A. Under MRE 702, Trial Courts Must Play The Role Of A Gatekeeper For Expert Testimony

1. Courts have recognized the potential for expert testimony to mislead jurors

All courts recognize that because of the extra weight that likely will be accorded to expert testimony, courts must be especially mindful of its admission. As this Court stated long ago when considering the admissibility of polygraph tests, "the tremendous weight which such tests would necessarily carry in the minds of a jury requires us to be most careful regarding their admission into evidence . . . ." *Davis*, 343 Mich. at 372. The Michigan Legislature, dissatisfied with the manner in which some courts were exercising their discretion regarding expert testimony, enacted a statute to limit that discretion in medical malpractice cases brought against specialists. M.C.L. § 600.2169. The legislative history of that statute discloses that the Michigan Legislature was attempting to ensure that experts were retained to add scientific value, rather than simply act as hired guns:

> This proposal is designed to make sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have first-hand practical expertise in the subject matter about which they are testifying. . . . This will protect the integrity of our judicial system by requiring real experts instead of "hired guns."

Report of the Senate Select Committee on Civil Justice Reform (September 26, 1995), *cited in McDougall v. Schanz*, 461 Mich. 15, 25 n.9, 597 N.W.2d 148 (1999). Proper application of MRE 702 will ensure the same protection in all cases in which a proposed expert is called to testify.

The United States Supreme Court similarly has recognized that the testimony of an expert witness is likely to enjoy a certain credibility not necessarily accorded other witnesses:

> Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. Presumably this relaxation of the usual requirement of first-hand knowledge . . . is premised on an assumption

> that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

Daubert, 509 U.S. at 592 (citations omitted).

The *Daubert* Court continued that, because of the weight juries are likely to accord to expert testimony, trial courts must be extra vigilant in determining whether that assumption of reliability rings true:

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.

Daubert, 509 U.S. 579 at 595 (quoting Weinstein, "Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended," 138 F.R.D. 631, 632). Accordingly, the *Daubert* Court held that FRE 702 required that "the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. *See also Elsayed Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063-64 (9th Cir. 2002), *amended by*, 319 F.3d 1073 (9th Cir. 2003 ("Maintaining *Daubert's* standards is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony.").

This extra weight that juries naturally place on expert testimony necessitates extra vigilance by trial courts to exclude purported expert testimony that does not bear the indicia of reliability.

2. Properly applied, Michigan Rule of Evidence 702 guards against inappropriate credence being accorded to expert testimony by imposing obligations on trial courts to ensure reliability prior to admission

a. MRE 702, like FRE 702, should be found to obligate the trial court to ensure the reliability of an expert by assessing the proposing party's offer of proof

In *Daubert*, the Supreme Court held that FRE 702 imposes an obligation on the trial court to ensure the reliability of expert testimony:

> [U]nder the Rules *the trial judge* must ensure that any and all scientific testimony or evidence admitted is not only relevant, *but reliable*. [¶] The primary locus of this obligation is Rule 702 . . . .

Daubert, 509 U.S. at 589 (emphasis added). The Court further explained that this obligation must be fulfilled *before* the testimony is permitted:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine *at the outset* . . . whether the expert is *proposing* to testify to (1) scientific knowledge that (2) will assist the trier of fact. This entails a *preliminary assessment* [of the reliability of the testimony].

Daubert, 509 U.S. at 592-93 (emphasis added).

The similar language in MRE 702 should require nothing less. Indeed, a comparison of MRE 702 with FRE 702 (as it read when *Daubert* applied it) suggests an even greater obligation on the Michigan trial courts:

MRE 702	FRE 702
If ***the court determines*** **that recognized** scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. [Emphasis added.]	If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The bold portion of MRE 702 above is the only difference between it and the Rule interpreted by the *Daubert* Court. This comparison demonstrates that Michigan courts should apply an even stricter standard than applied by the federal courts. Under the language common to both rules, Michigan courts should apply the same obligations recognized by the *Daubert* Court. But the additional language in MRE 702 requires Michigan courts to be even more circumspect. First, through the use of the word "recognized" before the word "scientific," Michigan retains the *Davis-Frye* requirement that expert testimony be derived from a method that is generally accepted in the scientific community.

Second, MRE 702 expressly adds the condition that "the court" must determine that expert testimony would be helpful before an expert can testify. Thus, it should not be incumbent on the opposing party, as the Court of Appeals held here, to root out all potential sources of unreliability. Indeed, the burden of demonstrating whether an expert witness will provide the added value to assist the trier of fact naturally resides with the party offering the expert witness. *See Anton v. State Farm Mut. Auto. Ins. Co.*, 238 Mich. App. 673, 679, 607 N.W.2d 123 (1999) ("The party offering the evidence has the burden of demonstrating its acceptance in the scientific community."); *Greathouse v. Rhodes*, 242 Mich. App. 221, 238, 618 N.W.2d 106 (2000) ("A party's attempt to establish the reliability of its experts before the jury must be accomplished through, and in a manner consistent with, the Rules of Evidence."), *rev'd on other grounds,* 465 Mich. 885, 636 N.W.2d 138 (2001); *Nelson v. Am. Sterilizer Co.*, 223 Mich. App. 485, 498, 566 N.W.2d 671 (1997) ("Plaintiff has failed to demonstrate that her expert's opinion testimony was derived from recognized scientific knowledge as required by MRE 702.").

The Michigan Legislature has imposed this obligation on courts in the context of actions "for the death of a person or for injury to a person." M.C.L. § 600.2955. That statute states, in part:

> [A] scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion [by considering several factors].

M.C.L. § 600.2955(1). As the Michigan Court of Appeals has recognized, the Legislature was ensuring that Michigan trial courts follow *Daubert* in personal injury cases:

> The Legislature enacted subsection 2955(1) in an apparent effort to codify [*Daubert*]. The plain language of the statute establishes the Legislature's intent to assign the trial court the role of determining, pursuant to the *Daubert* criteria, whether proposed scientific opinion is sufficiently reliable for jury consideration.

Greathouse, 242 Mich. App. at 238. But the trial courts already should have this role, under MRE 702. The trial and appellate courts simply are waiting for this Court to say so.[6]

This Court also should explain that a trial court cannot exercise its discretion regarding the admissibility of expert testimony by refusing to perform the gatekeeping function, or by performing it inadequately. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,158-159, 119 S. Ct. 1167 (1999) (Scalia, J., concurring) (trial court's discretion to choose *the manner* of testing expert reliability "is not discretion to abandon the gatekeeping function"; nor is it "discretion to perform the function inadequately"); *see also Elsayed Mukhtar*, 299 F.3d at 1066 ("[W]e require a district court

[6] *See supra* note 3. In *McDougall v. Schanz*, 461 Mich. 15, 597 N.W.2d 148 (1999), this Court recognized that legislative directives concerning the admission of evidence that express policy-based rules of substantive law must be respected. Furthermore, to the extent that no such legislatively declared principle of substantive law is contradicted, this Court retains the authority to apply MRE 702 and other rules of evidence in order to promote the fair and efficient administration of justice.
(continued...)

to make *some* kind of reliability determination to fulfill its gatekeeping function."; simply admitting the testimony over reliability objections is insufficient).

Here, neither the trial court nor the appellate court made an adequate reliability assessment. Faced with evidence that an expert testified beyond his knowledge, committed résumé fraud, and concealed a bias in favor of plaintiff's counsel, the trial and appellate courts did nothing. Rather, they concluded simply that "the jury could figure it out." Respectfully, however, MRE 702 imposes the gatekeeping function on the court, not the jury. This Court should now so hold.

b. MRE 702 obligates trial courts to determine whether the proposed testimony adds value or is mere "junk science"

Looking at the language of FRE 702, the *Daubert* Court first noted that, to meet the reliability criterion, an expert's knowledge must be "scientific," which the Court found "implies a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 590. While the testimony need not be "'known' to a certainty," any inferences or assertions made by an expert "must be derived by the scientific method." *Id.* General acceptance can still be a permitted, though not a required, aspect of the Rule 702 analysis. *Id.* at 594. But even "general acceptance" may be insufficient to permit expert testimony, as the Supreme Court explained when it revisited the admissibility of expert testimony in *Kumho Tire*:

> Nor, on the other hand, does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

526 U.S. at 151.

(continued)

See also People v. Kreiner, 415 Mich. 372, 378, 329 N.W.2d 716 (1982) (common law rules superceded by the adoption of the Rules of Evidence).

The Court in *Kumho Tire* also determined that a trial court's gatekeeping obligation applied not only "where an expert relies on the application of scientific principles," but also "where an expert relies 'on skill- or experienced-based observation.'" *Id.* The Court explained that the objective was the same regardless of the type of the source of the knowledge underlying the expert's proposed testimony:

> The objective of [the gatekeeping] requirement . . . is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Id. at 152.

By ensuring that experts meet this criterion, the Court was excluding purported experts who offer testimony based on non-existent expertise or unsupported by scientific method (*i.e.*, "junk science"). *See Kumho Tire*, 526 U.S. at 158-59 (Scalia, concurring) (trial court's gatekeeping obligation is "discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky"); *Elsayed Mukhtar*, 299 F.3d at 1063 ("The trial court must act as a 'gatekeeper' to exclude 'junk science' that does not meet Rule 702's reliability standards . . . . [T]he trial judge must ensure that 'junk science' plays no part in the decision."); *People v. Hubbard*, 209 Mich. App. 234, 242 n.2 (1995) ("'Junk science' has no place in our courtrooms.").

B. Trial Courts Must Ensure The Truthfulness Of The Expert's Qualifications And Limit The Expert's Testimony To The Confines Of Those Qualifications

1. MRE 702 obligates trial courts to ensure that an expert (i) has knowledge that will assist the jury and (ii) testifies within that knowledge

The *Daubert* Court described FRE 702 as "clearly contemplat[ing] some degree of regulation of the subjects and theories about which an expert may testify." *Daubert*, 509 U.S. at 589. In addition to requiring that the testimony have a scientific grounding, the Court focused on the

words "knowledge" and "may testify *thereto*." *Id.* (emphasis in original). The Court explained that knowledge "connotes more than subjective belief or unsupported speculation." *Id.* at 590. And the knowledge must be in the pertinent field of study about which the testimony is offered:

> [The] relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience *of his discipline*.

Daubert, 509 U.S. at 592 (emphasis added). Similarly, the Court in *Kumho Tire* focused on the testifying expert's display of the same intellectual rigor as an expert "in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Moreover, the knowledge of the expert must coincide with the issue to be decided by the jury. In the language of FRE 702 and MRE 702, the knowledge must "assist the trier of fact." The Court explained this precondition to admissibility, aptly described elsewhere as "fit":

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."

Daubert, 509 U.S. at 591. *See Kumho Tire*, 526 U.S. at 154 ("The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation.") (emphasis in original).

Thus, simply because an expert may be qualified as to one topic, he does not have free rein to offer speculative testimony regarding an inquiry on a different topic. As the *Daubert* Court summarized: "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a *precondition* to admissibility." *Daubert,* 509 U.S. at 591-92 (emphasis added). Thus, prior to permitting an expert to testify, a trial court must satisfy itself that the proposed expert has knowledge of the relevant field and that his testimony will be confined to that knowledge. Here, the trial court did neither, to the prejudice of DaimlerChrysler.

2. Plaintiff's expert's résumé fraud subverted the reliability criteria imposed by Rule 702

The *Daubert* Court stressed the importance of an expert's opinion being supported by knowledge and experience "of his discipline." The *Kumho Tire* Court stressed that an expert's opinion must be supported by the same intellectual rigor as an expert "in the relevant field." These requirements clearly are undermined where an expert lies about his qualifications, since he is lying about the knowledge or experience he has in that discipline, which will be the relevant field of testimony.

Here, Plaintiff's expert falsely told the jury that he possessed a Masters Degree in Psychobiology from the Department of Psychobiology at the University of Michigan. (588a-590a.) In truth, he possessed no such degree. Indeed, the University of Michigan does not offer a Master's Degree in Psychobiology, nor is there a Department of Psychobiology.[7] The nature of Hnat's misrepresentation is quite telling. By falsely claiming a degree in "psychobiology," Hnat attempted to suggest expertise regarding physical disorders, and he then testified regarding biological changes in Plaintiff's brain allegedly caused by harassment. Even a degree in "psychobiology" would plainly be inadequate to support such medical testimony, but Hnat's attempt to inflate artificially his credentials in this respect underscores the inadequacy of his actual credentials to justify his testimony.

Plaintiff's expert also testified falsely that he was the recipient of the prestigious Pillsbury Award. (588a.) The Court of Appeals bent over backward to overlook this outright perjury by stating that perhaps the expert had simply "misspoken." (87a.) But Plaintiff's own

[7] There is a Department of Psychology, in which one can attain a Master's Degree.

exhibit established that this was not a case of mere mistake; this was résumé fraud: Plaintiff's expert's Curriculum Vitae – Exhibit 11 – states as follows:

- Pilsbury [sic] Prize 1980
- 1985 Awarded Master of Psychology, Psychobiology

He then confirmed under oath that the Curriculum Vitae was true and accurate. (600a.) In fact, he did not receive the Pillsbury Award, and he was not "awarded" a Master's Degree in either Psychology or Psychobiology. These written entries on his résumé were not innocent overstatements during the court of trial testimony; they were outright fabrications.[8]

Through this résumé fraud, Plaintiff's expert conveyed to the jury that he had specialized knowledge or expertise in the particular discipline about which he was going to offer an expert opinion: psychobiology. Because he did not have the knowledge and expertise he purported to have, he undermined the assumption of reliability that excuses an expert from the usual requirement of first-hand knowledge. *Daubert*, 509 U.S. at 592.

The Court of Appeals also tried to avoid the issue by concluding that the jury had enough information to decide whether Hnat had the appropriate knowledge and expertise to offer relevant opinions:

> The record suggests that there was little possibility that the jury misunderstood the scope of Hnat's expertise. The trial court did not err in concluding that these flaws in his testimony did not taint the trial and resulting verdict to the extent that a new trial was necessary.

[8] Plaintiff's expert also likened himself to psychologists and psychiatrists during the course of his testimony. (6/23/99, Tr. 19, 22 (not included in Appendix).) He did not possess a degree or license in either of these disciplines.

(87a.) Under MRE 702, however, it is the trial court's job, not the jury's, to decide whether the proposed expert has the knowledge and expertise necessary to support the proposed testimony.

Nor should it be the burden of the opposing party to uncover the résumé fraud, as the trial court suggested. Such a rule simply encourages deceitful behavior with the hope that one does not get caught. Here, Hnat lied on the stand, and he lied on his résumé. No amount of questioning of the expert, whether in deposition or at trial, could have been expected to uncover the truth. Nor should the opposing party be expected to run down the details on each entry on a Curriculum Vitae. Rather, the burden should be on the party offering the witness to confirm in advance that the expert has the required knowledge and expertise to offer an opinion in the discipline where the party wishes to offer expert testimony.

Here, Plaintiff's counsel was in the perfect position to do that. Plaintiff's counsel's firm represented the expert in prior litigation in 1991, during which his Curriculum Vitae was produced. That earlier Curriculum Vitae, although created well after 1985 (when Hnat purportedly received the Master's Degree in Psychobiology), made no reference to Hnat having received a Masters Degree in psychology or psychobiology. Indeed, although it references being admitted to the doctoral studies program in the departments of Social Work and Psychology, it states that a Master's Degree was awarded only in Social Work. Curriculum Vitae of Stephen Anthony Hnat, p. 3; Exhibit I in Support of Defendant's Circuit Court Motion For New Trial On Fraud Grounds (older vitae is at back of Exhibit I; vitae presented at trial is toward front of Exhibit). Moreover, in the mediation summary signed by Fieger on behalf of Hnat in the 1991 litigation, Fieger wrote that Hnat held "a Masters Degree in Social Work," not Psychology or Psychobiology. Plaintiff's Mediation Summary, p. 1; Exhibit I in Support of Defendant's Circuit Court Motion For New Trial On Fraud Grounds.

Requiring the party offering the expert witness to establish his credentials would be consistent with the appellate opinions in this State. *See Anton v. State Farm Mut. Auto. Ins. Co.*, 238 Mich. App. 673, 679, 607 N.W.2d 123 (2000) ("The party offering the evidence has the burden of demonstrating its acceptance in the scientific community."); *Greathouse v. Rhodes*, 242 Mich. App. 221, 238, 618 N.W.2d 106 (2000) ("A party's attempt to establish the reliability of its experts before the jury must be accomplished through, and in a manner consistent with, the Rules of Evidence."), *rev'd on other grounds,* 465 Mich. 885, 636 N.W.2d 138 (2001); *Nelson v. Am. Sterilizer Co.*, 223 Mich. App. 485, 498, 566 N.W.2d 671 (1997) ("[P]laintiff has failed to demonstrate that her expert's opinion testimony was derived from recognized scientific knowledge as required by MRE 702."). Where the court learns that those credentials were falsified, and the expert's testimony materially affected the verdict, a new trial should be awarded.

3. Plaintiff's expert's pure medical speculation far exceeded his claimed expertise in psychobiology

The Court of Appeals further tried to downplay Hnat's résumé fraud by concluding that although he did not have the actual Masters Degree in Psychobiology, he had completed the coursework necessary for such a degree. In fact, according to Hnat's post-trial affidavit, he had completed coursework only for a Masters Degree in Psychology, not Psychobiology. In any event, he had neither degree at the time of trial.

Even assuming that a Department of Psychobiology existed (it did not), and even assuming this Department awarded such a Degree to Hnat (it did not), the trial court still failed to perform its gatekeeper function by limiting his testimony to that particular field. Rather, the court permitted Hnat to offer *medical* opinions that far exceeded any expertise he may have had in social work or psychobiology:

- Hnat testified about Plaintiff's "brain function" and "brain chemistry," opining that the alleged events at work caused a "fatigue" in the brain or "changes in the brain," that resulted in a "new disease in addition to alcoholism – major depressive disorder." (608a-612a, 617a-620a, 628a-632a, 638a-646a, 649a-655a, 660a-661a.)

- Hnat added the dramatic conclusion: "Plaintiff is clearly dying, that is what it means, she is clearly dying." (659a.)

- Hnat testified that the alleged harassment was, to a reasonable degree of "psychological certainty," the direct cause of a change in Plaintiff's brain chemistry, which yielded a new, irreversible and life-threatening condition – "major depressive disorder" in addition to her already existing alcoholism. (609a-613a, 617a-620a, 628a-632a, 638a-646a, 649a-655a, 660a-661a.)

- According to Hnat, the major depression took precedence over even her alcoholism and became a more immediate threat to her ability to survive. (636a-646a.)

- Hnat testified that based on his review of Plaintiff's later medical records, from other treaters, Plaintiff's body was beginning to "decompensate," and he could foresee Plaintiff's future and her death certificate. (608a-612a, 634a, 677a-683a.)

- Hnat gave detailed testimony on "medical complications that will be the proximate cause of Plaintiff's death," including "pancreatitis, chemically-induced hepatitis or [cirrhosis]." 6/28/99 (am), Tr. 56 (not included in Appendix).

- Hnat diagnosed Gilbert as "clearly dying" due to "medical complications," and predicted she was unlikely to live very long. (677a-683a.)

- Hnat projected that Plaintiff would soon be physically unable to work and was likely to die fairly soon, adding that "the pancreas as you know is very innervated and when you develop pancreatitis that is the most painful way to die." (683a.)

Chrysler's counsel objected to Hnat providing this medical testimony in which he endorsed and expanded upon selected diagnoses and comments of psychiatrists and other physicians in Plaintiff's medical records, even though those records reflected meetings that occurred years after Hnat's last session with Plaintiff. Indeed, Hnat had never physically examined Plaintiff, and of course was never qualified to do so. The only interaction Hnat had with Plaintiff was when he counseled her intermittently in an alcohol treatment program from 1992 to early 1994, five and one-half years prior to the June 1999 trial. Thus, Chrysler's counsel objected that Hnat "was not a medical doctor" with the expertise to offer testimony about medical issues based on a selective review of other doctors' records. (603a-605a.) Chrysler's counsel further objected to Hnat's acting as a conduit and sponsor for the diagnosis of "major depressive disorder" made by other unnamed treaters after Plaintiff last saw Hnat. (608a-611a.)

The trial court overruled these objections, and the Court of Appeals affirmed, even though it conceded that "at times, Hnat's testimony appeared to have a medical dimension." (91a.) The Court of Appeals attempted to justify Hnat's testimony by characterizing Chrysler's objection at trial as being "that a social worker could not testify as an expert on substance abuse." (89a-90a.) Chrysler, however, was not contending that Hnat could not testify as an expert on substance abuse. Chrysler's objection was that his testimony far exceeded the confines of substance abuse, and that he

gave testimony regarding the purported medical consequences for Plaintiff of the alleged harassment.

It was this testimony that far exceeded his qualifications (assuming they were what he said they were) and should have been excluded by the trial court performing its gatekeeping function. *See Nelson v. Am. Sterilizer Co.,* 223 Mich. App. 485, 494, 566 N.W.2d 671 (1997) ("As a general rule, the federal courts have found expert opinion testimony concerning the medical causation of disease to be admissible where the testimony is supported by statistically valid epidemiological studies."); *People v. Walker,* 84 Mich App. 700, 702-03, 270 N.W.2d 498 (1978) (trial court erred in qualifying social worker as expert in mental competency issue where nothing in the record indicated he was qualified to make such determination); *People v. Skowronski,* 61 Mich. App. 71, 79, 232 N.W.2d 306 (1975) (trial court erred in qualifying social worker as expert to evaluate psychological test given to defendant). Evidence was presented to the trial court that social workers may not make independent diagnoses. *See* Affidavit of Michael F. Abramsky, Ph.D., pp. 2-3; Exhibit H in support of Defendant's circuit court motion for new trial on fraud grounds.

The appellate decisions cited by the Court of Appeals and by Plaintiff do not compel a different result. In *Chmielewski v. Xermac Inc.,* 457 Mich. 593, 613-14, 580 N.W.2d 817 (1998), this Court permitted testimony that a plaintiff's job performance had been affected by alcoholism. Unlike here, the testimony in question in that case did not involve expert medical issues such as brain chemistry or diseases developed from alcoholism that would cause a premature death. In *Grow v. W.A. Thomas Co.,* 236 Mich. App. 696, 601 N.W.2d 426 (1999), the court permitted a social worker to testify regarding the plaintiff's symptoms of post-traumatic stress disorder, but only because that social worker had a lengthy history of experience dealing with clients suffering from post-traumatic stress disorder. The social worker in *Grow* did not attempt to opine on the plaintiff's

physical, medical condition or prognoses. Moreover, the social worker in *Grow* based his testimony on his own treatment of the plaintiff, not the medical records of doctors who had treated the plaintiff much later, as Hnat did here.

Based on Hnat's "expert" testimony, Plaintiff's counsel Fieger was permitted to argue in closing argument that Hnat had testified that he had "read her death certificate" which recorded her death "in a haze of alcohol" from "a violent event if she drives, or [from] the effects of alcohol on her body." He further stated without qualification that Plaintiff would develop "a chronic hepatitis, cirrhosis," dehydration, "a metabolic acidosis that will slowly put her into a coma," and "chronic pancreatitis," and concluded: "She will suffer severe abdominal pain, and she will die. And she will not live out her life." (1264a-1265a.) Plaintiff's counsel added that pancreatitis was "one of the most painful diseases known to medical science." (1264a-1265a) (emphasis added). Of course, there was no appropriate medical expert on which to base this closing argument.

By allowing Hnat to offer medical expert opinion, and allowing counsel to argue it in his closing, the trial court and the Court of Appeals let through the gate "expert" testimony that did not have the indicia of reliability required by MRE 702. This Court should reverse the jury verdict and, if JNOV is not ordered based on DaimlerChrysler's other arguments, order a new trial.

C. MRE 702's Reliability Criteria Include Protections Against Bias That May Stem From A Prior Or Current Relationship Between Expert And Counsel

1. Bias of an expert can reach a point where the evidence becomes inherently unreliable

Neither *Daubert* nor *Kumho Tire* had the opportunity to address what obligations a trial court had under FRE 702 to ferret out potential bias in an expert witness. While some courts have relegated this issue to the weight that should be accorded the evidence rather than the admissibility of the evidence, the gatekeeping function of Rule 702 suggests a different analysis: the

trial court, not juries, should assess whether expert testimony is sufficiently reliable. If a bias impairs that reliability, the evidence should not even be presented to a jury for consideration. While instances of working together will not always – or even often – suggest a bias impinging on an expert's reliability, when counsel and the expert conceal or misrepresent their prior and current relationship, the expert's proffered testimony is inherently unreliable. If the trial court makes such a determination, the expert should be excluded.

While *Daubert* and *Kumho Tire* did not directly address the issue of bias in an expert, the Supreme Court did set forth the rule that the trial court is responsible for determining "whether the testimony is not only relevant, but reliable." *Daubert*, 509 U.S. at 589 (emphasis added). An extreme bias in favor of one party or the other by a purported expert, of course, undermines any such reliability. In fact, the opinion testimony becomes not that of an expert, but of an advocate.

Several courts have begun to recognize this issue. In *United States v. Kelley*, 6 F. Supp. 2d 1168 (D. Kan. 1998), the court rejected a proffered marijuana expert who was going to testify whether the marijuana grown by the defendants was intended for distribution or not. The court initially noted the inherent dangers of expert testimony based on its "aura of special reliability and trust," *id.* at 1180, and recognized that its gatekeeping function was to determine whether the evidence was reliable. After noting that an expert witness's bias generally goes to the weight of the testimony, the court then explained that it is possible for the bias to go so far that the testimony was inherently unreliable:

> On the other hand, there is a line of cases which have held that "'where an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading.'"

Id. at 1183 (*citing Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972, 984 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994); *Viterbo v. Dow Chem. Co.*, 646 F. Supp. 1420, 1425-26 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987); *Johnston v. United States,* 597 F. Supp. 374 (D. Kan. 1984)).

In *In re Aircraft Disaster at Detroit Metro. Airport on August 16, 1987*, 737 F. Supp. 427 (E.D. Mich. 1989), *aff'd*, 917 F.2d 24 (6th Cir. 1990) (unpublished table decision), the court rejected an affidavit from a proffered expert (a right to life advocate) who was going to testify about the viability of a fetus of one of the deceased victims of the air crash. In rejecting the proffered expert's testimony, the court noted that his history suggested that he would be more of an advocate than an independent expert:

> It appears to this court that Wilke is an ardent supporter and a leader of the right-to-life movement and, as such, his opinion regarding the viability of a fetus cannot be accepted as objective.

Id. at 430.

In *Viterbo*, the court also rejected a proffered expert on the grounds that the expert's bias would render his opinion prejudicial and misleading:

> Most important, Singer sought employment from the plaintiff's attorneys in this case; thus, he ... did not view Viterbo's condition objectively. As stated in *Johnston v. United States*, 597 F. Supp. 374 (1984), where an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading.

646 F. Supp. at 1425-26.

The evidence here demonstrated that Hnat was more of an ardent supporter of plaintiff's counsel than an objective expert. Making matters worse, both the expert and counsel here misrepresented their relationship to the jury, suggesting it was less than it actually was. That combination, coupled with the Court of Appeals' concession that it was the expert's testimony that

permitted the jury to award such an exorbitant sum, compels the conclusion that DaimlerChrysler was unfairly prejudiced, and, absent JNOV for DaimlerChrysler on other grounds, a new trial should be awarded.

2. Misrepresentation of an existing relationship prejudices the opposing party and is therefore grounds for a new trial

Plaintiff's counsel attempted to conceal Hnat's bias by improperly minimizing the extent of the relationship in his opening statement. He told the jury only:

- that Hnat had worked on plaintiff's counsel's gubernatorial campaign during 1998;
- that Hnat had worked in plaintiff's counsel's law firm during 1998 and 1999; and
- that his relationship with Hnat was "coincidental."

Hnat furthered this deception by testifying that at the time of trial he was "primarily employed as a psychiatric social worker," and he denied that he was working exclusively, or even predominantly, for Fieger's law firm. (585a, 594a-599a, 704a-705a.) The facts of their relationship, however, were quite different:

- Hnat and Fieger had been friends "since college" (in the mid-1970s);
- Hnat had worked as a consultant for Fieger since about the late 1980s on "well over 30" trials, 16 or 17 of which had produced multi-million dollar verdicts;
- Fieger referred to Hnat as his "closest personal advisor";
- Just prior to the June 1999 trial, Hnat listed plaintiff's counsel's firm as his primary employer;
- Hnat coined the term "Fiegertime," stating that after the two worked together to select a jury for trial, it was "Fiegertime," meaning time to have fun and "kick some butt."

Indeed, Fieger conceded that the relationship between the two had grown so strong that after Fieger lost the November 1998 gubernatorial election, Hnat worked as a consultant "in

nearly every case I have tried since, with the exception of the Gilbert case." (Fieger Affidavit 11/9/99, submitted in opposition to Defendant's Circuit Court Motion For New Trial on Fraud Grounds.)

The Court of Appeals, as it did with the question of the expert's qualifications, essentially left the bias question up to the jury, agreeing with the trial court that "the strength of a bond between people is a largely subjective question . . . ." (85a.) The Court of Appeals concluded:

> The jury certainly had enough information about this connection to conclude, if it chose to do so, that Hnat might not be objective or credible. If there was any error in not revealing more of the relationship, the error was harmless . . . .

(85a-86a.)

In order to perform adequately the gatekeeping function, however it is the trial court's duty, when assessing the reliability of the expert witness's proposed testimony, to examine the strength of a bond between the lawyer and the expert. Under the teaching of *Daubert* and its progeny, that task should not be left to the jury. Where, as here, an expert has a history of working with plaintiff's counsel not only as an expert, but as a jury consultant specifically employed to help select juries that will secure multi-million dollar verdicts, the proposed expert testimony is suspect. Where the expert and counsel actively conceal that relationship by suggesting that their interaction was something less, the proposed testimony loses all indicia of reliability. It is a trial court's duty in such circumstances to exclude that testimony, rather than allowing the jury to make that reliability assessment. Where the concealment is not uncovered until after the expert testified, and that testimony impacted the outcome of the case, it is the trial court's obligation to grant a new trial.

The trial court here failed to assess any potential bias between counsel and expert – either before the testimony was given, or through a post-trial evidentiary hearing – to determine

whether the expert was serving as a true expert or merely as an advocate for the plaintiff or her counsel. By failing to do so, it abdicated its gatekeeper function under MRE 702. Because the trial court's failure unfairly prejudiced DaimlerChrysler, a new trial should be awarded, absent an award of JNOV to DaimlerChrysler on the grounds asserted in its brief.

IV. A NEW TRIAL SHOULD BE ORDERED BECAUSE THE DAMAGES AWARD WAS EXCESSIVE

The Court of Appeals here conceded that this was not the worst case of harassment in history:

> [T]he conduct in this case [is] somewhat lower on the continuum of harassment than the worst abuse ever perpetrated in an employment setting . . . .

(75a.) Yet, the jury award was by many multiples the highest award of any ever judicially approved in a sexual harassment setting in Michigan. This juxtaposition is irreconcilable and was grounds for a new trial. Reviewing courts must analyze whether awards fall within a range of reasonableness established in other cases. Only in that manner will an award fall in approximately the same place on the continuum as the conduct. Where the award is so far off the mark, a complete new trial may be the only remedy. Absent that, however, a remittitur is appropriate.

A. The $21 Million Damage Award Far Exceeded All Judicially Affirmed Verdicts In Analogous Circumstances

1. Where damages so greatly exceed the range of reasonableness, a complete new trial is required

This Court has set forth guidelines for courts to follow when addressing the excessive nature of a jury award, but they went unheeded by the Court of Appeals here. In *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 443 N.W.2d 354 (1989), this Court held that "the question of the excessiveness of a jury verdict is generally one for the trial court in the first instance." *Id.* at 531. The Court further made it clear that the trial court "should examine a number of factors (such as

whether the verdict was induced by bias or prejudice)," and ultimately the trial court's analysis must be guided by "objective considerations relating to . . . the evidence addressed." *Id.* at 532. The exorbitant size of the award here – viewed objectively – shows that the jury was indeed swayed by bias, anger, or prejudice.

A fairly recent employment case illustrates the proper analysis where, as here, the compensatory damages are wildly disproportionate to actual injury:

> The Court finds that, based on the evidence adduced at trial [sexually suggestive comments to the plaintiff and others about coworkers and customers] . . . the jury's award of $3,000,000 in compensatory damages for sexual harassment was excessive. . . . The immensity of the jury's award in this case suggest that the jury's verdict on all issues was "tainted" and can be explained only on the basis of "passion, sympathy, or prejudice rather than an objective consideration of the facts."

Becker v. Wal-Mart Stores, Inc., No. 6:96CV00220, 1997 U.S. Dist. LEXIS 16066, at *13-14 (M.D.N.C. Aug. 20, 1997) (complete new trial granted, not remittitur) (citation omitted; emphasis added). *See Burns v. City of Detroit,* ____ Mich. ____, 658 N.W.2d 468, 468 (2003) ("New trials limited to damages are disfavored, and normally ordered only when liability is clear.") (citations omitted).

Wells v. Dallas Independent School District, 793 F.2d 679 (5th Cir. 1986), another employment discrimination case, provides the rationale for ordering a complete new trial rather than remittitur. In *Wells*, the trial court elected to remit an exorbitantly excessive $1.9 million damage award to $250,000. The remittitur was reversed, and a total new trial was ordered. The appellate court found that, given the massive size of the remittitur, (i) passion and prejudice must have affected the initial verdict, and (ii) the trial court therefore abused its discretion in not ordering a new trial:

> [W]hen a jury verdict results from passion or prejudice, a new trial, not remittitur, is the proper remedy. On the other hand, damage awards which are merely excessive, that is, so large as to be contrary to right reason, are candidates for remittitur. However, at some point on the scale an excessive award becomes so large that it can no longer be considered merely excessive. At that point, when an award is "so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive," remittitur is inadequate and the only proper remedy is a new trial.
>
> We conclude that today's case, in which the district court felt compelled to reduce a $1.9 million award by more than an order of seven, is one in which the jury award was so large that it reflected passion or prejudice . . . . [W]e find it difficult to regard the quarter-million dollar remnant of a virtual two-million dollar verdict as in any significant sense a product of the jury. It was the judge's verdict; a new trial is called for.

Id. at 683-84(citations omitted) (emphasis added).

The Court of Appeals here offered the absurd rationalization that the award was not based on passion or prejudice because the jury awarded only 15% of the $140 million requested by Plaintiff's counsel. (94a.) Under that logic, an attorney can avoid a passion or prejudice finding simply by inflating the amount of the damages he suggests to the jury. The more reasoned approach is that where an award far exceeds a range of reasonableness, courts must assess whether it is the product of passion and prejudice.

2. Awards in other cases help determine what is reasonable and what is excessive

Palenkas made it clear that a comparison of jury awards is proper to determine whether the award in a particular case is within reason:

> [A] comparison of jury awards in analogous facial injury cases is warranted here. While such a comparison cannot serve as an exact indicator, it does provide an objective means of determining the range of appropriate awards in such cases.

432 Mich. at 538. Other courts have reached this conclusion as well. In *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002), the court ordered remittitur of a $300,000 emotional distress award.[9] The court found that evidence of emotional injury did not mean that a reviewing court could "concede [the] reasonableness of just any award a jury may assign." *Id.* at 830. Rather, a reviewing court must make a determination regarding excessiveness based on what other awards have been affirmed in similar cases:

> [A] mainstay of the excessiveness determination is comparison to awards for similar damages. This use of comparison is a recognition that the evaluation of emotional distress is not readily susceptible to "rational analysis."

Id. (citation omitted). Ultimately, the court concluded that other cases that "inform[ed] our evaluation" demonstrated that the award was too high:

> A comparison of other emotional distress damage awards in this circuit stemming from discrimination points to $100,000 as the proper award.

Id. at 833.[10] *See also Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 367 (5th Cir. 2002) (award of $100,000 for future emotional distress reversed "because our precedent does not support a $100,000 award based on such insubstantial injuries").

Here, DaimlerChrysler demonstrated to the trial court (and the Court of Appeals) that the award of $21 million was far and away the highest award ever in a sexual harassment case in Michigan. Indeed, the research presented to the court showed that, prior to this case, the highest award ever affirmed in a published Michigan sexual harassment case was $272,000. The award here

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[9] The jury had awarded $1,000,000, but because the statutory cap limited the award to $300,000, the appellate court concluded that the proper analysis was whether $300,000 was excessive.

[10] The court multiplied that amount by 1.5 to determine the appropriate remittitur amount "to avoid substituting our opinion for that of the jury . . . . Anything more would be 'clearly excessive.'" *Id.*

is more than 70 times that amount. Absent evidence of conduct or injury that justifies an award that many multiples in excess of the highest award ever, the award cannot stand.

The Michigan Chamber commissioned a study of compensatory damages for claims of employment discrimination brought under 42 U.S.C. § 1981, which allows for unlimited damages, to see if the results would differ under federal law.[11] The highest compensatory award affirmed in a published decision under that statute since 1989 was $375,000, which was the remitted amount following a jury award of $1.15 million. *Evans v. Port Auth. of New York & New Jersey,* 273 F.3d 346 (3d Cir. 2001). The compensatory award here was over 53 times higher than the award in that case.[12]

Given the Court of Appeals' concession that the conduct here was "somewhat lower on the continuum of harassment," there is no way the jury's award here should have been affirmed. But the Court of Appeals was operating under the assumption that it could not – or should not – compare the award here to a range of reasonableness established by awards affirmed in similar cases. This Court should now hold that such an analysis is not only useful, but required, to properly assess whether an award is excessive.

B. Attorney Or Expert Witness Misconduct Can Serve As Grounds For Remitting The Damages, If A New Trial Is Not Granted.

This Court also should assess the impact of counsel and witness misconduct on a jury award. Here, an expert witness testified that he had qualifications that he did not have, and then offered "expert" medical opinions that he was not qualified to give even if he had the knowledge and

[11] Claims for sexual harassment under Title VII would not present an appropriate comparison, given the $300,000 statutory cap on damages.

[12] An Appendix summarizing the facts of each such case and the corresponding award was filed with this Court with the Michigan Chamber's Motion for Leave to File Amicus Brief.

expertise he said he had. On top of that, the expert and the counsel who retained him concealed the fact that they had a long history of working together as counsel and jury consultant, securing over a dozen multi-million dollar verdicts.

The Court of Appeals conceded that it was the testimony of this "expert" that permitted the jury to award such an exorbitant sum:

> [The jury] could have found compelling Gilbert's evidence that she would die an untimely death . . . . Alternatively, the jury could have found persuasive Gilbert's evidence that her life was and would be completely joyless because the harassment had caused her to develop major depressive and post-traumatic stress disorders changing the fundamental chemistry in her brain.

(94a.)

All of this "evidence" referenced by the court was the "expert" testimony offered by Hnat. Because the trial court should have excluded it in the first place, and because its admission clearly was prejudicial, the Court should order a new trial. At a minimum, this Court should hold that the trial court erred in not ordering a substantial remittitur, since such misconduct clearly contributed to a grossly excessive verdict, and trial courts can consider the effect of such misconduct, whether objected to or not, in analyzing whether the jury's award was excessive. *See Reetz v. Kinsman Marine Transit Co.*, 416 Mich. 97, 101-02, 330 N.W.2d 638 (1982) (even where error is not properly preserved, court must decide whether new trial should nevertheless be ordered because the misconduct caused a result that likely would not have happened absent the misconduct).

V. CONCLUSION

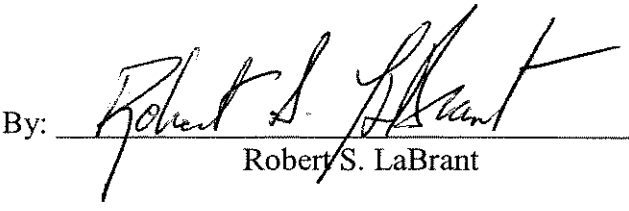
Plaintiff is working as a millwright at the DaimlerChrysler plant today. Her award, with interest now approaching $40 million, was based on the following fantasy spun by a social worker essentially allowed to testify as a medical expert: Unknown to Gilbert, she was going to

prematurely die of hepatitis, dehydration, acidosis, cirrhosis or pancreatitis caused by an alcohol addiction that she would have been able to overcome but for co-worker sexual harassment inappropriately dealt with by the company. This purely medical testimony, from an "expert" whose last contact with the plaintiff had been over five years before trial, and who had never medically examined her, occurred in the following context: (1) the "expert's" résumé revealed as his sole "medical" education a master's degree in psychobiology; (2) the master's degree in psychobiology was résumé fraud and nonexistent; and (3) despite disinformation to the contrary provided by both the attorney and the expert, they were a "tag team" who had previously teamed up in more than 30 different trials. A forty-million-dollar rip-off based on a fiction concocted by counsel and his pseudo-expert cannot stand.

The trial court here failed to perform its expert witness gatekeeper obligations imposed by MRE 702, particularly with respect to ensuring that experts are not allowed to testify outside their qualifications, and that expert résumé fraud, expert bias and falsification of the facts pertaining thereto will be dealt with appropriately. The trial court also failed to evaluate the excessive nature of the "soft" damages award (here mental pain and suffering), by comparing it to a range of reasonableness established by similar verdicts. The Michigan Chamber respectfully suggests that these failures on the part of the trial court unfairly prejudiced DaimlerChrysler, and, if JNOV is not awarded based on the other issues DaimlerChrysler has raised, a new trial should be ordered.

DATED: July 8, 2003

MICHIGAN CHAMBER OF COMMERCE

By: 

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